

1                   **BEFORE THE POLLUTION CONTROL HEARINGS BOARD**  
2                   **STATE OF WASHINGTON**

3   **W.G.CLARK CONSTRUCTION CO.**   )  
4                                    Appellant,   )   **PCHB No. 92-226**  
5                                    v.            )  
6   **PUGET SOUND AIR POLLUTION**   )   **FINDINGS OF FACT,**  
7   **CONTROL AGENCY**                    )   **CONCLUSIONS OF LAW AND**  
8                                    Respondent.   )   **FINAL ORDER**  
  )

9           This case came before the Board on an appeal of a Notice and Order of Civil Penalty  
10   issued by Respondent on December 4, 1992. A hearing was held in Lacey, Washington on  
11   June 30, 1993, at which time witnesses were sworn and testified, exhibits were introduced,  
12   and arguments heard. The Board having considered all the evidence hereby issues the  
13   following

14                                   **FINDINGS OF FACT**

15   I

16           Notice and Order of Civil Penalty No 7692 was issued by Puget Sound Air Pollution  
17   Control Agency ("PSAPCA") on December 4, 1992, under the authority of RCW 70 94 and  
18   PSAPCA Regulation III, Article 4.04(b)

19   II

20           During August of 1992, Appellant W.G. Clark Co. ("Clark"), a general contractor,  
21   had a contract to perform work on and had control of a site at and adjacent to 23249 Pacific  
22   Highway South in Des Moines, Washington.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

### III

The work for which Clark had been contracted by the owner of the property, Gramor Development NW Inc , included demolition of existing buildings on the site and new construction.

### IV

On July 16, 1992, Barbara Gloyd of Hazcon, Inc., an accredited laboratory, analyzed samples from the floor tiles in "Shed #1" on the Clark site. She found 20% chrysotile asbestos and less than 1% tremolite asbestos in one sample, and 12% chrysotile and 1% tremolite asbestos in another sample.

### V

On August 3, 1992, Envir-O-Tech, Inc. dba Envir-O-Comply filed a "Notice of Intent to Remove or Encapsulate Asbestos" form with PSAPCA, who assigned it case number 9202209. The form reported their intent to abate 400 square feet of vinyl asbestos tile in Shed #1. Envir-o-Tech's estimate of the cost of the abatement was \$2,000

### VI

On August 20, 1993, Lead Air Pollution Inspector Rosemary Busterna and Inspector Harnet Bryant of PSAPCA visited the site to inspect Envir-O-Tech's compliance with PSAPCA regulations in abating the asbestos in Shed #1.

### VII

Busterna and Bryant were shown around the site by Don Frederickson, Clark's Project supervisor. Their inspection found that Shed #1 had already been demolished.

### VIII

Busterna spoke with Bud Cranford, President of Envir-o-Tech, Inc., who confirmed that Shed #1 had been demolished before his crew removed the asbestos

IX

Busterna spoke with Bruce Hansen, President of Boulevard Excavating, who confirmed that his company had demolished Shed #1 on orders from Don Frederickson of Clark.

X

Busterna issued Notice of Violation No. 10-000829 on September 3, 1992, to Envir-o-Tech, Inc., Gramor Development NW, Inc, Clark, and Boulevard Excavating, Inc for violation of PSAPCA Reg. III Article 4.04(b). Subsequently, on December 4, 1992, she issued Notice and Order of Civil Penalty No. 7692 to Gramor, Clark, and Boulevard, with a penalty in the amount of \$2,000.

XI

On December 10, 1992, Clark filed an appeal of Notice and Order of Civil Penalty #7692 with the Board. Gramor and Boulevard did not appeal.

XII

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the preceeding findings, the Board makes these

**CONCLUSIONS OF LAW**

I

The Board has jurisdiction in this matter under RCW 43.21B.110

II

The Washington Clean Air Act is a strict liability statute. RCW 70 94.040 Clark, which controlled the property at the time of the violation, is strictly liable for violations of the Clean Air Act occurring on the site:

*The Washington Clean Air Act is a strict liability statute. Acts violating its implementing*

1 *regulations are not excused on the basis of intent.*  
2 *Moreover, the duty to comply cannot be delegated*  
3 *away by contract Pearson Construction v PSAPCA,*  
4 *PCHB No. 88-186 (1989).*

5 We are convinced that the duty which applies in this case is non-delegable.  
6 Federal Way School District #210 v. PSAPCA, PCHB No.86-164 (1987).

7 III

8 Demolition of Shed #1 without prior abatement of the asbestos-containing materials  
9 identified in the Hazcon tests was a violation of PSAPCA Regulations:

10 *Causing or allowing the demolition of any*  
11 *building, vessel, structure, or portion thereof,*  
12 *without removing all asbestos-containing materials*  
13 *before any before any activity that would disturb the*  
14 *materials or prevent access to the materials for*  
15 *removal and disposal PSAPCA Reg III Art.4 04(b).*

16 IV

17 Appellant's contention that its demolition without abatement falls within an exemption  
18 for non-friable material is without merit. While PSAPCA had the initial burden of proof  
19 regarding the violation, when the Appellant claimed an exemption from the statute, the burden  
20 shifted. Interstate Industrial Mechanical, Inc. v PSAPCA, PCHB No 88-147/88-175 (1990)  
21 Having destroyed the evidence on the site, Appellant has left itself with no way to carry its  
22 burden.

23 This conclusion is not without inherent justice. It is difficult to imagine PSAPCA  
24 being able to enforce the Clean Air Act if violators were free to destroy the physical evidence  
25 of their violations and then claim that the evidence would have supported an exemption from  
26 the Act.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

V

The Board's consideration of appeals is *de novo*. WAC 371-08-183(2). In civil penalty cases, the hearing before the Board is *de novo* and the agency has the initial burden of proof as to the violation and also the reasonableness of the penalty. Protan Laboratories v DOE, PCHB No. 86-20.

VI

PSAPCA met their burden of proof regarding the violation.

VII

PSAPCA's reasoning regarding the amount of the penalty is more problematic. Clearly, the penalty was not beyond their statutory authority: the Act authorizes penalties of up to \$10,000 per day. However, a penalty is not necessarily reasonable simply because it could have been higher.

The purpose of assessing penalties is not only to punish violations, but also to deter future violations in order to prevent air pollution:

*It is further the intent of this chapter to prevent air pollution. .*  
RCW 70 94 011.

In testimony before the Board, PSAPCA described their penalty policy as intended to be "90% deterrence and 10% punishment". Therefore, we conclude that issuing a penalty which has no deterrent value is not reasonable.

The evidence in this case demonstrates that the cost of abatement to Clark would have been \$2,000. This being the case, and given that the probability of a future violation being detected by PSAPCA is substantially less than 100%, a penalty of \$2,000, as issued by PSAPCA, has no deterrent value. If a violator can anticipate a fine no more than equal to the

1  
2 cost of proper abatement, a rational violator will break the law, since the expected cost (fine if  
3 caught times probability of being caught) of violation is less than the expected cost (abatement  
4 price) of compliance.

5 We therefore conclude that the penalty issued by PSAPCA is not reasonable. it is too  
6 small to have its desired effect.

7 VIII

8 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such  
9 From these Conclusions of Law, the Board issues the following

10 ORDER

11 The finding of a violation by Clark is affirmed.

12 The penalty assessed by PSAPCA, \$2,000, is overturned as unreasonable, and a  
13 penalty of \$4,000 is ordered.

14 DONE this 10th day of August, 1993.

15 POLLUTION CONTROL HEARINGS BOARD

16   
17 Richard C. Kelley, Presiding Member

18   
19 Robert V. Jepsen, Chairman

20  
21 P92-226F  
22  
23  
24  
25  
26  
27